

United States District Court



**REPORT
ON
MEDIATION**

2005

I. PROGRAM OVERVIEW

2005 marked the tenth year of the mediation program. Over the decade the program has changed considerably, and so has the legal environment. This report will not attempt to review all of the historical developments of the program, as much of that history was described in the 2004 report. A few historical facts and figures may be helpful, however, for purposes of perspective.

Development of the Program

When the program began in 1995, it was at the request of the Civil Justice Reform Act Implementation Committee as a part a plan to expedite the preparation and disposition of civil cases. Because at that time Nebraska had no “state court culture” of mediation, that request stemmed largely from Nebraska lawyers’ experiences with mediation in other states. As there was no institutional experience here, the court opted to establish a “volunteer” mediation program, rather than a mandatory one. That preference has continued to the present.

The court also established a training program for mediators. It was decided the mediators chosen for federal cases should be lawyers and should have been certified by the state’s Office of Dispute Resolution as having been trained in their basic, four-day training program, and that they should also attend additional mediation training offered by the court. So far, five Federal Mediation (“Fed-Med”) teaching seminars have been held, and approximately 200 Nebraska lawyers have been trained. In addition, to keep mediators abreast of developments and to have “refreshers” on mediation skills, one-day workshops for approved mediators were held nearly every year. All training was at least partially funded by the Federal Practice Fund. Over time, the number of “approved” mediators has hovered around fifty until the last two years, when it has fallen dramatically. At the conclusion of 2005 there were 35 approved federal mediators.

Through informal methods of encouragement, the program has resulted in over 500 cases being mediated. For the same period the court’s civil caseload has decreased sporadically, from over 1200 civil filings in 1996 to only about 950 in 2005 (accompanied by skyrocketing increases in the criminal caseload). Rates of settlement have fluctuated, but for the entire life of the program, over half of those cases (58%) were settled “at the table,” that is, during the mediation session. Another fifteen percent were settled later in the life of the case, but as reported by the lawyers, only “because of” the mediation. Thus, the overall effective settlement rate was 73%. Taking only the last half of the decade, 66% of the cases mediated settled “at the table,” and the effective settlement rate was 81%. It can be seen that if one measures “success” only by the number of settlements attributable to mediation, the program has been improving with time.

That improvement is probably due to many factors, including that the mediators are getting better, from experience and/or education and training; the lawyers are also improving in their mediation advocacy skills for the same reasons; the lawyers are getting better at selecting the kinds of disputes they choose to mediate; and the lawyers are getting better at selecting the type of mediator (that is, the types of procedures, strategies, and practices of the mediator) they think will best address the issues in the dispute.

There are additional ways to measure “success.” Over the course of the program the evaluations by participants have consistently been very high in almost all categories. Participants have reported that the process has allowed parties to be “heard,” to have “control” over resolution of their case, and to be actively involved in the resolution of their dispute, and that these were important to them, even if the case didn’t settle during the mediation. In addition, in mediated cases which settled during the mediation session, parties and lawyers have consistently reported that the mediation brought the parties to settlement earlier than it could have settled without mediation, saving them both time and money.

Program Revisions Between 1995 and 2005

Several changes have been made over the years in an effort to improve the program and its use. The major ones are described below.

1. Selection of Mediators. The original Mediation Plan called for approved mediators to be “matched” with cases by subject matter, on a rotation basis, and the matching was done by the state mediation centers. The purpose of this system was to ensure that all approved mediators would have an equal chance at getting cases to mediate, rather than let “market forces” select the mediators, which, it was feared, would result in a few better-known mediators receiving all the cases, whether or not they were actually better mediators. However, not allowing the parties and their lawyers to select their own mediators was not effective, and after a “first” mediation experience using this referral system, many lawyers declined the court’s efforts to refer subsequent cases to mediation.

In retrospect, this was probably the principal reason the program did not start out on a good footing. Selection of the mediator based on the parties’ and the lawyers’ assessment of their needs for particular styles of mediation is a critical factor in the success of any mediation. The court’s failure to recognize that at the beginning of the program hampered its acceptance and development.

In 2000 the Mediation Plan was amended to eliminate the centers from the referral process, and rather, to direct the parties and lawyers to select and hire their mediators themselves. Although this change did not cause more cases to be mediated, it likely improved the lawyers’ willingness to consider mediation, since they could evaluate what their case needed and select mediators who could meet those needs. The change also

recognized that there were a number of lawyers in Nebraska whose practices included providing settlement services (purists could debate whether or not it was technically “mediation”), and some were quite successful in facilitating settlements, even though perhaps they had received little or no formal mediation training at all and/or were not “approved” by the court to mediate federal cases.

2. Fees. At the outset of the program the court set maximum fees the approved mediators could charge. This restriction was also eliminated in 2000, so mediators can charge whatever rate they choose. They are also permitted to charge travel expenses.

Another change was made in 2004 to permit the Federal Practice Fund to advance mediation fees to parties who are unable to participate in mediation because of lack of funds. If the case is resolved by any payment of money to that party, the Fund must be reimbursed.

3. Scheduling. When the mediation centers were doing the referrals, they were also scheduling the mediations, sometimes causing an inordinate amount of “phone tag” in cases that later were resolved without the mediation actually taking place. This, too, was eliminated in the 2000 amendments, so currently the lawyers schedule directly with their selected mediator. The Plan now provides that a non-refundable “scheduling fee” may be charged if the mediation does not take place as scheduled, the fee to be credited against the mediation fees charged by the mediator if the mediation does take place.

4. Mediators’ Qualifications. The court did not want to “certify” mediators, thereby conveying some sort of “guarantee” of the quality or results of a mediation or a particular mediator’s competence. Therefore, the Mediation Plan adopted an “approval” system, setting forth certain minimum qualifications for a lawyer to get on a list of “approved” mediators by virtue of his/her training and mediation experience. The Plan’s initially established qualification requirements did not include any particular litigation experience, however, and required only a 16-hour training in “federal mediation” in addition to the “basic” mediation skills training offered by the state’s Office of Dispute Resolution. This lack of a requirement for litigation experience was criticized by participants in mediations, their evaluations grading down the process because the mediator was not knowledgeable about the substantive law of the case.

This was also perceived as a major shortcoming, because lawyers had to “educate” the mediator on the law and/or litigation practice, taking more time and lessening the mediator’s credibility in the mediation session. (Again, purists could argue whether success as a mediator requires a background in the substantive law, since mediators facilitate by managing a process, not deciding substantive issues). Lawyers criticized the process as “too touchy-feely,” referring to the mediators’ concentration on “process” and their reticence to become involved in resolving cases on the basis of the substantive law.

This, too, was changed in the 2000 amendments to the Plan. Currently, in addition to the other qualification requirements, the Plan requires a lawyer to have had at least five

federal court cases, at least one of which proceeded to trial to a verdict or judgment, or to have represented a client in at least five state court trials. In addition, the amount of “Fed-Med” training required has been raised from 16 to 24 hours.

5. Mediator Training. Requiring lawyers to have a certain amount of training to be eligible for approval under the Plan required the court to offer such training. This is done in two ways. First, the three-day “Fed-Med” training is offered periodically as needed to accommodate the interests of lawyers in becoming approved mediators. Five such training seminars have been conducted, each taught by an experienced mediator and mediation instructor affiliated with the CPR Institute for Dispute Resolution, New York City, and assisted by facilitators through the state’s Office of Dispute Resolution. Second, the approved mediators are invited to attend a one-day mediation skills/ethics workshop taught by an experienced and nationally recognized mediator-instructor, also assisted by facilitators through the state’s Office of Dispute Resolution.

The Plan was amended in 2004 to limit the resources directed at training. The expenses of the “Fed-Med” training are partially paid by the Federal Practice Fund; the expenses of the skills/ethics workshop are paid entirely by the Federal Practice Fund at no cost to the attendees. The “Fed-Med” training is offered no more frequently than once every three years; the skills/ethics workshops are offered no more frequently than once every other year. The last “Fed-Med” training seminar was held in December, 2002. The last skills/ethics workshop was held in October, 2003.

Program Revisions in 2005-2006

Last year showed decreases in use of the program, as shown by the accompanying tables. That falling off was the subject of considerable discussion among the judges, lawyers, and the Federal Practice Committee. In August Magistrate Judge Piester enlisted the help of approved and non-approved mediators, the Federal Practice Committee, the law schools, the Office of Dispute Resolution, and others interested in mediation in determining why so few federal cases were being mediated and what, if anything should be done about that. After a half-day meeting, the group reached consensus on several conclusions, among them:

- The overall goal of the court’s mediation program should be to reduce the court’s civil caseload and workload by providing litigants an informal, effective, prompt, and less expensive alternative to litigation to resolve their disputes, while preserving an enhanced sense of fairness to the parties, and ensuring access to the court’s formal litigation functions when necessary.
- Because “lawyers will follow the judges,” the district, bankruptcy, and magistrate judges MUST support the program and actively encourage parties to mediate their disputes; without such active support, actions by others will be ineffective in increasing use of mediation.

- Some types of cases should be put on a track that includes an “almost mandatory” mediation, in the sense that the court’s management “default” should be “to mediate” unless the parties opt *out*, instead of the present “not to mediate” unless the parties opt *in*.
- There is a need to educate judges, lawyers, mediators and the public on all aspects of Alternative Dispute Resolution, including skills training for lawyers acting as advocates as well as mediators or neutrals, and the ethical requirements of applicable statutes.
- The court should continue to require of its approved mediators some threshold of experience, education, and training in skills and ethics, and should continue to offer training for mediators, both initial and “continuing mediator education,” especially regarding ethics.

From these premises the group formulated a specific set of action proposals to be promoted to the Federal Practice Committee and through them, to the judges of the court. The Federal Practice Committee’s subcommittee appointed to address the matter reported their proposals at its meeting in October in conjunction with the Eighth Circuit Judicial Conference. At the next meeting of the Judicial Council (comprised of the district’s judges and unit executives) a proposal was adopted to request further input on the proposals by Arthur Pearlstein, Executive Director of the Creighton Law School’s Werner Institute. Mr. Pearlstein accepted the invitation, and reported back to the Judicial Council at its meeting in January, 2006, proposing actions be taken to improve the mediation program. Those proposals were referred to a committee consisting of Chief Judge Bataillon and the three magistrate judges. The committee conferred and decided to adopt several of the Pearlstein proposals, but concluded the members of the committee could do that without action by the Judicial Council. Therefore, at the April, 2006 meeting of the Judicial Council Chief Judge Bataillon simply reported the actions that were adopted by the committee. Those actions are set out in the “Outlook” section of this report.

II. MEDIATION STATISTICS, 2005

A. Raw Numbers

Period: January - December 2005

	Mediator Approved	Mediator Not Approved	Total
Referrals Pending Beginning of Period	0	1	1
Mediation Orders Entered	5	9	14
Mediation Orders Withdrawn	0	0	0
Settled Prior to Mediation Session	1	1	2
Referrals Pending End of Period	2	5	7
Total Cases Mediated (With MRO) ¹	2	4	6
Cases Mediated (No MRO)	12	11	23 ²
Total Cases Mediated	14	15	29
Mediation Reference Orders, by Division	Mediator Approved	Mediator Not Approved	Total
Omaha	5	6	11
Lincoln	0	3	3
North Platte	0	0	0
Total	5	9	14

¹ "MRO" means "Mediation Reference Order."

² Some mediations take place without entry of a mediation reference order. They are counted when they are reported by the attorneys to have settled or when there is a final pretrial conference. If a mediated case ends by involuntary dismissal or summary judgment, however, the court is not always informed of the fact or results of that mediation, so there could have been more "No-MRO" mediations than appear in this report.

Cases Mediated Without MRO, by Division	Mediator Approved	Mediator Not Approved	Total
Omaha	8	7	15
Lincoln	3	3	6
North Platte	1	1	2
Total	12	11	23
Outcome of Mediated Cases (MRO)	Mediator Approved	Mediator Not Approved	Total
Full Agreement	2	3	5
Partial Agreement	0	0	0
No Agreement	0	1	1
Outcome of Mediated Cases (No MRO)			
Full Agreement	9	9	18
No/Partial Agreement	3	2	5 ³
Total	14	15	29
Summary of No/Partial Agreement, After Closure	Mediator Approved	Mediator Not Approved	Total
Trial Settings Pending Beginning of Reporting Period	2	15	17
No or Partial Agreement, This Period (from above)	3	3	6
Settled	3	3	6
Judgment Entered Without Trial or Settlement	0	0	0
Transfer to Bankruptcy	0	0	0
Trials Held During Reporting Period	2	1	3
Trial Settings Pending at End of Reporting Period	0	14	14

³ Because of the inherent authority in tracking “No MRO” cases (see Note 2, above), there could have been more cases that had “no” or “partial” agreements.

B. Follow-up Surveys

Survey questionnaires were sent to counsel in the 6 cases mediated in 2005 which did not settle at the mediations, but which DID settle later, to determine if the settlements occurred "because of" the mediation, "in spite of" the mediation, or if the mediation had "no impact" on settlement. Responses were received from 12 attorneys in 6 cases:

TOTAL RESPONSES:

MEDIATOR	"Because Of"	"In Spite Of"	"No Impact"	Total
APPROVED	1	1	5	7
NON-APPROVED	1	1	3	5
TOTAL	2	2	8	12

CASES REPORTED ON:

MEDIATOR	"Because Of"	"In Spite Of"	"No Impact"	Total
APPROVED	1	1	1	3
NON-APPROVED	0	1	2	3
TOTAL	1	2	3	6

This pattern of very few cases being settled after a mediation "in spite of" the mediation has been consistent over the life of the mediation program,⁴ but particularly for the last four years. Thus, even if cases do not settle "at the table" during a mediation, there is little likelihood that mediation would harm settlement prospects.

⁴ The numbers of cases settled after an unsuccessful mediation, in which the attorneys said the case settled later "in spite of" the mediation are as follows:

1998: 3 of 20 later settled cases

2002: 2 of 16 later settled cases

1999: 4 of 15 later settled cases

2003: 0 of 15 later settled cases

2000: 2 of 13 later settled cases

2004: 2 of 10 later settled cases

2001: 0 of 9 later settled cases

2005: 2 of 6 later settled cases

III. OBSERVATIONS FROM THE NUMBERS

A. MEDIATION "CAUSED" SETTLEMENT IN 83% OF THE CASES MEDIATED:

Adding the cases settled at the mediations (23) and those later settled "because of" the mediation (1) yields a total of 24 of the 29 cases actually mediated (83%) were settled directly because of the mediation program.

Effects of Mediation on Settlement, 2005:

Mediator	Cases Mediated	Settled AT Mediation	Settled "Because of" Mediation	Total Cases Settled	Effective Rate of Settlement
Approved	14	11	1	12	86%
Non-Approved	15	12	0	12	80%
Totals	29	23	1	24	83%

B. THE PATTERN OF FEW TRIALS IN POST-MEDIATION CASES⁵ CONTINUES:

There were 23 post-mediation cases tracked in 2005 (17 still pending trial at the beginning of the year, plus the 6 mediated in 2005 without settlement). Of these 23, only 3 cases have been tried, and 14 remained set for trial at the end of the year. In the last eight years (January 1, 1998 through December 31, 2005), there were 403 cases mediated, and 141 of those cases were not settled "at the table." Of all these cases, only 22 cases have later gone to trial, again with 14 cases remaining set for trial at the end of 2005. The highest number of trials of post-mediation cases in one year was six in 2000.

C. IN 2005 APPROVED AND UNAPPROVED MEDIATORS HAD ROUGHLY THE SAME RATES OF SETTling CASES "AT THE TABLE":

The number of mediations and rates of settlement, divided according to whether or not the mediator was approved by the court, are below:

⁵ "Post-mediation cases" are those that did not settle during the mediation itself.

2005	Approved	Non-Approved	Overall Totals
Total Cases Mediated	14	15	29
Cases Settled In Mediation	11 79%	12 80%	23/29 79%
Effective Settlement Rate	12/14 = 86%	12/15 = 80%	24/29 = 83%

The differences in results as between approved and non-approved mediators has fluctuated over the last five years, the only years results were so calculated.⁶ Those results are in the next section.

D. OTHER OBSERVATIONS:

Number of Cases Mediated: The number of mediations (29) was below average. In the past six years the number of mediations in federal cases has hovered around fifty per year; except for 2002 when there were seventy mediations.

Number of Mediation Reference Orders: There were only 14 MROs entered in 2005. This is a continuing trend. Compared with the average number of mediated cases, this means that more attorneys are seeking mediation services without the involvement of the court. If the attorneys do not want to stay the progression of the case during the pendency of the mediation, and have no qualms about the need for sanctions if something goes wrong at the mediation, they have no need to seek an MRO. However, when the court enters an MRO, it helps the court follow the case and tabulate the results of the mediation. In addition, since the court “stands behind” the approved mediators with (a) greater willingness to require certain preparatory actions for mediations and (b) more authority to sanction parties and/or counsel if they do not abide by the order, obtaining an MRO is a good idea.

Geography: Most of the 2005 mediation reference orders emanated from Omaha in 2005. This is a change from past years when most emanated from Lincoln, which has been consistent over the course of the program. However, there are more mediations without MRO’s in Omaha cases than Lincoln.

Number of Approved Mediators: At the end of 2005 there were 35 approved mediators. This is down from 42 at the end of 2004.

⁶ In years before 2001 the statistics were divided by whether the mediator was contacted through a mediation center or directly by the parties, not by whether the mediator was approved by the court. Since 2001 the statistics have distinguished mediators by their approved/non-approved status and counted the results accordingly.

IV. HISTORICAL COMPARISONS

A. EFFECTIVE SETTLEMENT RATES HAVE IMPROVED OVER TIME:

As shown in the table below, since the program's inception **507** cases have been mediated, and **295 (58%)** have settled "at the table," that is, during the mediation session, and the effective settlement rate was **73%**. Disregarding the first 27-month period of the program (counted in this tabulation as one year), for the eight-year period 1998-2005, of 403 cases mediated there were 259 settlements "at the table" (**64%**), and an effective settlement rate of 318 **79%**. If one further restricts the comparison to the last five years, there were 164 of 247 cases settled "at the mediation table" (**66%**), and the effective settlement rate improves to **81%**. The highest "effective settlement rate" was 91% in both 2003 and 2004; the lowest was 50% for the first period of the program's existence, the 27-month period ended 12/31/97.

Historical Settlement Rates, 1995 - 2005

Year	Oct. 1995 - Dec. 1997	1998	1999	2000	Overall 1995-2005
Cases Mediated	104	50	56	50	507
Settled at Mediation	36/104 35%	24/50 48%	33/56 59%	41/50 82%	295/507 58%
"Effective" Settlement Rate	52/104 50%	37/50 74%	36/56 64%	45/50 90%	370/507 73%

Year	2001	2002	2003	2004	2005	Overall 2001-2005
Cases Mediated	49	70	55	44	29	247
Cases Settled In Mediation	31/49 63%	39/70 56%	38/55 69%	33/44 75%	23/29 79%	164/247 66%
"Effective" Settlement Rate	35/49 71%	50/70 71%	50/55 91%	40/44 91%	24/29 83%	199/247 81%

B. STATUS OF MEDIATOR DOES NOT SEEM TO SIGNIFICANTLY INFLUENCE SETTLEMENT RATES:

Although the rates of settlement, both during the mediation and the effective settlement rates, have varied, there is no consistency as between “approved” mediators and “non-approved” mediators. Some years approved mediators appear to have higher settlement rates, and other years, non-approved mediators do. If one combines the number of settlements for the last five years, approved mediators settled 82 of 113 cases **(73%)** “at the table” and had a combined effective settlement rate of 95/113 **(84%)**. Non-approved mediators settled 84 of 134 cases **(61%)** “at the table” and had a combined effective settlement rate of 104/134 **(78%)**. While it is at least arguable that the record of settlements, both at the table and the effective settlement rate, is higher for approved mediators, the low number of cases mediated may render that difference statistically insignificant.

	Approved Mediator					Non-Approved Mediator				
Year	2001	2002	2003	2004	2005	2001	2002	2003	2004	2005
Cases Mediated	25	27	28	19	14	24	43	27	25	15
Cases Settled In Mediation	18/25 72%	19/27 70%	21/28 75%	13/19 68%	11/14 79%	13/24 54%	20/43 47%	17/27 63%	20/25 80%	12/15 80%
Effective Settlement Rate	19/25 76%	24/27 89%	24/28 86%	16/19 84%	12/14 86%	16/24 67%	26/43 60%	26/27 96%	24/25 96%	12/15 80%

V. EVALUATIONS

After each mediation the participants were asked to complete an evaluation form, judging various aspects of their mediation from 1 (Excellent!) to 5 (Terrible!). (Copies of the evaluation forms are in the Appendix). They were asked to mail it back to the court. Averaged responses to some of the questions are set forth in the table below.⁷

EVALUATION QUESTION	PTY-APP	PTY-NON	ATTY APP	ATTY NON	OVERALL
"How was the mediator at remaining neutral?"	2	1.5	1	1	1.38
"During the mediation session, how was the mediator-- ...at giving you opportunities to express your views?"	1	1	1	1	1
"...at understanding your/your client's interests and needs in the dispute?"	2	1.5	1	1	1.38
"...at allocating appropriate time for the mediation?"	4	1	1	2	2
"...at treating you with fairness and respect?"	2	1	1	1	1.25
"How well were the legal issues of the case identified and discussed during the session?"	3	1	1	2	1.5
"Overall, how would you rate the mediation process in your case?"	2	1	1	2	1.5
"From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved?"	2	1	1	2	1.5

If these numbers are statistically significant, attorneys' evaluations of their mediations were perhaps slightly more positive than those of parties' and insurers' evaluations, and non-approved mediators get about the same "grades" as approved mediators. Because of the small number of cases mediated, however, it is doubtful that these numbers are statistically sound. That said, these scores are generally consistent with evaluations received throughout the life of the program; that is, viewed historically, 2005 appears not to have been significantly different from the overall tallies for preceding years.

There were too few evaluations returned to have any fair sampling regarding the other evaluation questions.

⁷ "PTY-APP" means "Parties and Insurers–Approved Mediators." "PTY NON" means "Parties and Insurers–Non-Approved Mediators." "ATTY APP" means "Attorneys–Approved Mediators." "ATTY NON" means "Attorneys–Non-Approved Mediators."

VI. CONCLUSIONS: 2005

- ✓ In 2005 mediation caused or accelerated settlements in **83%** of the cases mediated.
- ✓ The low number of federal cases mediated continues.
- ✓ In 2005 a number of participants thought mediation saved them time and/or money, but so few participants evaluated that factor that the average was not calculated.
- ✓ Participants' opinions of their mediation experience indicate mediation does foster a perception of fairness, involvement, and control among parties.
- ✓ There continue to be a few mediators, both approved and not approved, who seem to be the leaders in attracting federal cases for mediation. Thus, our statistics are not as "broad-based" as they would be were the cases spread more evenly among mediators. The "market" drives the selection of mediators by the attorneys in each particular case, and the selection process is a complicated mixture of factors, unique in many cases.

VII. CONCLUSIONS: 1995-2005

- ✓ Since the court's first mediation referrals (1996), **nearly 3/4 of the cases mediated have settled** either "at the table" or "because of" the mediation. This "effective settlement rate" for the entire ten-year period is **73%**.
- ✓ The combined "effective settlement rate" for the last five years, 2001-2005, is **81%**, showing continuing improvement with time.
- ✓ Parties, insurance representatives, and litigating counsel have consistently rated their mediations very favorably, even when the cases did not settle "at the table."
- ✓ Parties have consistently rated their mediations very favorably, as fair, impartial, and an opportunity to be heard, to be actively engaged in the process, and to exert some control over the outcome of their dispute.
- ✓ Parties, insurance representatives and litigating counsel have consistently reported that mediating has caused their cases to be settled earlier and at less cost than could have been the case with normal settlement negotiations.
- ✓ Despite the nudging of some of the judges of the court, not many civil cases are being mediated.

The court's mediation program has made significant contributions to the ADR horizon in Nebraska. It has definitely been instrumental in establishing a "culture" among Nebraska lawyers that includes Alternative Dispute Resolution and more specifically, mediation. It gave the mediation trend a credibility boost at a time when most Nebraska lawyers and judges had not heard of mediation and had no idea what it was, much less how it worked. The court's continued involvement and promotion of mediation over the years has continued to lend stature to mediation statewide. The program has "trained" about 200 Nebraska lawyers in how to be mediators, and offered additional "workshops" in mediation skills. Our program was also one (if not the main) reason some 300-400 Nebraska lawyers have attended and completed the "basic" mediation training offered through the Nebraska Office of Dispute Resolution. Our requirements to qualify as an "approved federal court mediator" were and continue to be more stringent than the state's standards for qualification of mediators. Finally, the court's program has helped spawn a "cottage industry" of lawyer-mediators in Nebraska, to the extent that a few lawyers' practices are limited to mediating cases, and further, that the practicing bar can distinguish among mediators on the basis of the types of strategies and procedures they use in a mediation session and can "shop" for the "right" mediator, accordingly. This development may show there has been a certain maturation of the program with accompanying sophistication of the bar.

VIII. OUTLOOK

As noted earlier, several changes have now been adopted, as of April, 2006, aimed at increasing the use of mediation in settling civil cases in this court. They are as follows:

- Magistrate judges will include in initial progression orders the court's "expectation" that the lawyers and parties explore mediation
- The lawyers in a case will be required to report to the court their compliance with the court's expectation that they discuss mediation with their clients and opponents prior to the planning conference at which a trial date is determined
- Planning conferences will be postponed until the mediation report described above has been received
- Planning conferences may be postponed until the parties have reported that they have exchanged settlement proposals
- The court will send educational materials regarding mediation with its annual assessment notices
- During planning conferences magistrate judges will inquire as to the lawyers' and parties' willingness to mediate the case, and if there is no good reason not to mediate, will require a subsequent report on their efforts to schedule a mediation
- All trial judges will encourage mediation and settlement negotiations at every stage of the case

- Judges may require clients to attend and participate in planning conferences in person or by phone
- The court may request that experienced mediators allow other mediators to observe their mediations with the parties' consent
- The court may offer or participate with others in offering training to lawyers on "how to represent your client in mediation"
- The court will re-start its mediation training agenda
- A new "ADR Administrator" will be appointed

Time will tell whether any of these measures will have any effect on the number of cases being mediated. The court's willingness to adopt them, however, does reflect a commitment to mediation as the ADR method of choice, and a commitment to actively encourage, but not require, mediation in all appropriate cases.

APPENDIX

1. EVALUATIVE COMMENTS, 2005	i
2. EVALUATION QUESTIONNAIRE FORMS	iii

1. EVALUATIVE COMMENTS, 2005

A. PARTIES' COMMENTS ON EVALUATION FORMS

The evaluation forms were distributed to participants in the mediations held through the auspices of approved federal mediators as well as the non-approved mediators. The comments received from the parties and insurance company claims representatives appear below:

In Cases That Did Settle During the Mediation Session (Approved Mediator):

"Mr. _____ did a great job with difficult clients on both ends. Although both my client and the mediator expected the settlement to be higher, he did his job in bringing the defendant to top dollar."

In Cases That Did Settle During the Mediation Session (Non-Approved Mediator):

"My first time with this mediator. Interesting process."

In Cases That Did Not Settle During the Mediation Session (Approved Mediator):

No comments received.

In Cases That Did Not Settle During the Mediation Session (Non-Approved):

No comments received.

B. ATTORNEYS' COMMENTS ON EVALUATION FORMS

In Cases That Did Settle During the Mediation Session (Approved):

"Mr. _____ has mediated numerous cases for me, and I consider him the area's premier mediator. Very difficult plaintiff with several diagnosed personality disorders."

"Great mediator on a touchy case with a tough plaintiff and lien issues."

In Cases That Did Settle During the Mediation Session (Non-Approved):

No comments received.

In Cases That Did Not Settle During the Mediation Session (Approved):

No comments received.

In Cases That Did Not Settle During the Mediation Session (Non-Approved):

"I believe there would have been a substantially greater likelihood of success if a 'fully authorized representative' for the insurance carrier had been present. Though an adjuster and the lawyer for the Defendant and carrier were there, a phone call had to be made later in the day in order to obtain higher authority. I believe that all persons present at the Mediation were disappointed in the failure of the carrier, per its representative who was not present, to bring the discussions into a closer settlement range."

C. ATTORNEYS' COMMENTS RECEIVED IN FOLLOW-UP SURVEY

Approved: "Because Of":

"Negotiations continued following mediation - certainly mediation played a strong role here in getting the parties closer. Got parties to be specific and helped a great deal."

Approved: "In Spite Of":

"Plaintiff's position in mediation was unreasonable, inflexible, and unexpected by defendants."

Approved: "No Effect":

"It did not appear to have positive or negative impact. The defendant had seemed to be willing at the time prior to mediation to reach resolution. I can't say why they seemed less willing to resolve when we met; probably a combination of factors unrelated to mediation itself."

Non-Approved: "Because Of":

No comments received.

Non-Approved: "In Spite Of":

"I believe plaintiff's counsel has now adopted the approach that mediation is a useful tool in determining a defendant's settlement authority. My recent experience is disappointing in that due to this obvious use of the process (abuse?), neither party is comfortable in moving forward in a honest effort to resolve the case during the mediation process."

Non-Approved: "No Effect":

"Mediation did not produce settlement but did permit the parties a much clearer view of the strengths and weaknesses of their case."

2. EVALUATION QUESTIONNAIRE FORMS

FORM 1: EVALUATION OF MEDIATION—ATTORNEYS

Name of Case: _____ Number of Hours in Session(s): _____

Mediator(s): _____

Date, Place of Mediation Session(s): _____

I am: _____ plaintiff(s) attorney
_____ defendant(s) attorney

This mediation resulted in:
_____ full settlement of case
_____ partial settlement
_____ no settlement of the case

For each question below, please circle the response that reflects your opinion, using the following key for your answers: 1="Excellent!"; 2="Good"; 3="Adequate"; 4="Poor"; 5="Terrible!"

1. How efficient was the procedure of court referral and arranging the mediation session? 1 2 3 4 5
 2. How was the mediator at explaining mediation? 1 2 3 4 5
 3. During the mediation session(s), how was the mediator at:
 - a. Giving you opportunities to express your views? 1 2 3 4 5
 - b. Understanding your client's interests and needs in this dispute? 1 2 3 4 5
 - c. Treating you with fairness and respect? 1 2 3 4 5
 4. How was the mediator at remaining neutral? 1 2 3 4 5
 5. How well were the legal issues of the case identified and discussed during the session? 1 2 3 4 5
 6. How was the mediator at allocating appropriate time for the mediation without rushing you to reach an agreement or dragging out the process? 1 2 3 4 5
- _____ Moved too quickly _____ Moved too slowly _____ Paced right

7. If you reached full or partial agreement,

- a. To what extent was the mediator responsible for it? 1 2 3 4 5
- b. To what extent do you think the mediation saved you money in resolving this case? 1 2 3 4 5
- c. Please "guesstimate" how much money saved: \$_____
- d. To what extent do you think the mediation saved you time in resolving this case? 1 2 3 4 5
- e. Please "guesstimate" how much time saved:
_____ hours of attorney time

8. If you reached full settlement, in your view, would the case have settled later without mediation?
_____ yes _____ no

9. If you reached only partial agreement, to what extent was the mediator helpful in identifying possible areas of future agreement? 1 2 3 4 5

10. From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved? 1 2 3 4 5

11. Overall, how would you rate the mediation process in your case? 1 2 3 4 5

12. How appropriate was the fee? ____Too High ____Too Low ____ About Right

13. How helpful was it that the mediator was a lawyer? ____Very ____Somewhat ____ Not

COMMENTS: _____

THANK YOU!!

FORM 2: EVALUATION OF MEDIATION--PARTIES AND INSURERS

Name of Case: _____ Number of Hours in Session(s): _____

Mediator(s): _____

Date, Place of Mediation Session(s): _____

I am: _____ plaintiff
_____ defendant
_____ plaintiff's insurer/subrogee
_____ defendant's insurer

This mediation resulted in:
_____ full settlement of case
_____ partial settlement
_____ no settlement of the case

For each question below, please circle the response that reflects your opinion, using the following key for your answers: 1="Excellent!"; 2="Good"; 3="Adequate"; 4="Poor"; 5="Terrible!"

1. How efficient was the procedure of court referral and arranging the mediation session? 1 2 3 4 5
2. How was the mediator at explaining mediation? 1 2 3 4 5
3. During the mediation session(s), how was the mediator at:
 - a. Giving you opportunities to express your views? 1 2 3 4 5
 - b. Understanding your interests and needs in this dispute? 1 2 3 4 5
 - c. Treating you with fairness and respect? 1 2 3 4 5
4. How was the mediator at remaining neutral? 1 2 3 4 5
5. How well were the legal issues of the case identified and discussed during the session? 1 2 3 4 5
6. How was the mediator at allocating appropriate time for the mediation without rushing you to reach an agreement or dragging out the process? 1 2 3 4 5

_____ Moved too quickly _____ Moved too slowly _____ Paced right

7. If you reached full or partial agreement,

a. To what extent was the mediator responsible for it? 1 2 3 4 5

b. To what extent do you think the mediation saved you money in resolving this case? 1 2 3 4 5

c. Please "guesstimate" how much money saved: \$_____

d. To what extent do you think the mediation saved you time in resolving this case? 1 2 3 4 5

e. Please "guesstimate" how much time saved:
_____ hours of attorney time _____ hours of your time

8. If you reached full settlement, in your opinion would the case have settled later without mediation? ____ yes ____ no

9. If you reached only partial agreement, to what extent was the mediator helpful in identifying possible areas of future agreement? 1 2 3 4 5

10. From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved? 1 2 3 4 5

11. Overall, how would you rate the mediation process in your case? 1 2 3 4 5

12. How appropriate was the fee? ____Too High ____Too Low ____About Right

13. How helpful was it that the mediator was a lawyer? ____Very ____Somewhat ____Not

COMMENTS: _____

THANK YOU!!